Wan Hamzah bin Wan Muda & Anor v Marzuki bin Ibrahim & Anor

HIGH COURT (KUALA TERENGGANU) — CIVIL APPEAL NO 12–38 OF 2000
NIK HASHIM J
22 JANUARY 2002

Civil Procedure *— Absence of plaintiff — Dismissal of action due to — Absence of plaintiffs and defendants on date of trial, whether adjournment should be granted instead — Whether judge erred in dismissing plaintiffs' action*

The plaintiffs appealed against the decision of the sessions court judge in dismissing the plaintiffs' action on the ground that the plaintiffs were absent on the date set for trial. The defendants were also absent, though counsel for both parties were present. The plaintiffs' counsel requested for an adjournment but was rejected, and the plaintiffs' action was thus dismissed. Hence the appeal. The issues for determination were: (i) whether the judge was right to dismiss the plaintiffs' action in this case; (ii) whether the plaintiffs' action ought to be struck out in the circumstances; and (iii) whether the request for adjournment ought to be allowed by the trial court.

Held:

(1) The learned judge was erroneous when he dismissed the plaintiffs' action as the facts did not disclose that the defendant was present on the date of the trial. At that juncture, the law does not give the court the right to dismiss the plaintiffs' action. The dismissal of the plaintiffs' action was thus premature, and indeed not in accordance with O 28 r 7(a) of the Subordinate Courts Rules 1980 (see pp 155H–156A).

(2) Although the court could not allow all adjournments sought, in the event of doubt as to the real reason behind the inability of the other party to attend court, the court should have allowed an adjournment to enable both parties to be heard. Any delay occasioned by what appeared to be an inadequate reason for absence could be compensated by an award of appropriate costs. In exercising the discretion to grant an adjournment, the court had to consider the merits of the application (see p 156B–C); *Hup San Timber Trading Co Sdn Bhd v Tan Ah Lan* [1979] 1 MLJ 238 and *Abdul Mutalib bin Dato' Seri Razak v The Malaysian Bar & Anor* [1997] 3 MLJU 342 followed; *Syarikat Pasir Perdana v Goh Pak Hoong Tractor and Building Construction* [1981] 1 MLJ 314 distinguished.

(3) It was unjust to dismiss the plaintiffs' action simply because of the plaintiffs' absence. Thus, in order to do justice to both parties, the adjournment sought by the plaintiffs' counsel ought to be allowed with costs by the learned judge to enable both parties to be heard

A at a trial. In the circumstances, the learned judge's orders in refusing to grant the adjournment and dismissing the plaintiffs' action were therefore wrong in law and should be set aside (see p 156D–E).

B **Obiter**:

What the learned judge ought to have done at most was to strike out the plaintiffs' action and thereafter it was for the plaintiffs to apply to reinstate the matter giving reasons for the non-attendance. If the trial court found that the reasons given were not C satisfactory and sufficient then only he shall dismiss the plaintiffs' application with costs (see p 156A).

[Bahasa Malaysia summary

D Plaintif-plaintif telah membuat rayuan terhadap keputusan hakim mahkamah sesyen menolak tindakan plaintif-plaintif atas alasan bahawa plaintif-plaintif tidak hadir pada tarikh perbicaraan. Defendan-defendan juga tidak hadir, walaupun peguam bagi kedua-dua pihak hadir. Peguam plaintif-plaintif telah memohon untuk satu penangguhan tetapi telah ditolak, dan tindakan plaintif-plaintif oleh E demikian ditolak. Justeru itu rayuan dibuat. Persoalan-persoalan untuk ditentukan adalah: (i) sama ada hakim bertindak betul dengan menolak tindakan plaintif-plaintif dalam kes ini; (ii) sama ada tindakan plaintif-plaintif patut dibatalkan dalam keadaan berikut; dan (iii) sama ada permohonan untuk penangguhan patut dibenarkan oleh mahkamah perbicaraan.

F **Diputuskan**:

(1) Hakim yang arif telah terkhilaf apabila menolak tindakan plaintif-plaintif kerana fakta-fakta tidak menunjukkan bahawa defendan hadir pada tarikh perbicaraan. Setakat ini, undang-undang tidak G memberikan mahkamah hak untuk menolak tindakan plaintif-plaintif. Penolakan tindakan plaintif-plaintif oleh itu adalah pra masa, dan sememangnya tidak mematuhi A 28 k 7(a) Kaedah-Kaedah Mahkamah Rendah 1980 (lihat ms 155H–156A).

(2) Walaupun mahkamah tidak membenarkan semua penangguhan H yang dipohon, sekiranya berlaku keraguan mengenai sebab sebenar di sebalik ketidakupayaan pihak yang satu lagi untuk hadir di mahkamah, mahkamah patut membenarkan satu penangguhan bagi membolehkan kedua-dua pihak didengar. Apa-apa kelewatan yang disebabkan oleh apa yang kelihatan seperti satu sebab yang tidak mencukupi untuk ketidakhadiran I boleh diberikan pampasan melalui satu award dengan kos yang bersesuaian. Dalam menggunakan budi bicara untuk membenarkan satu penangguhan, mahkamah perlu

mempertimbangkan merit permohonan tersebut (lihat ms 156B–C); *Hup San Timber Trading Co Sdn Bhd v Tan Ah Lan* [1979] 1 MLJ 238 dan *Abdul Mutalib bin Dato' Seri Razak v The Malaysian Bar & Anor* [1997] 3 MLJU 342 diikut; *Syarikat Pasir Perdana v Goh Pak Hoong Tractor and Building Construction* [1981] 1 MLJ 314 dibeza.

(3) Adalah tidak adil untuk menolak tindakan plaintif-plaintif semata-mata ketidakhadiran plaintif-plaintif. Oleh itu, bagi tujuan keadilan dilaksanakan ke atas kedua-dua pihak, penangguhan yang dipohon oleh peguam plaintif-plaintif patut dibenarkan dengan kos oleh hakim yang arif bagi membolehkan kedua-dua pihak didengar dalam satu perbicaraan. Dalam keadaan berikut, perintah-perintah hakim yang arif dalam menolak kebenaran penangguhan tersebut dan menolak tindakan plaintif-plaintif oleh demikian adalah salah di sisi undang-undang dan patut diketepikan (lihat ms 156D–E).

Obiter:

Apa yang hakim yang arif patut lakukan sekurang-kurangnya adalah membatalkan tindakan plaintif-plaintif dan oleh demikian ia adalah untuk plaintif-plaintif untuk memohon dihidupkan perkara tersebut dengan memberikan sebab-sebab ketidakhadiran. Sekiranya perbicaraan mahkamah mendapati bahawa sebab-sebab yang diberikan tidak memuaskan dan mencukupi maka hanya demikian beliau patut menolak permohonan plaintif-plaintif dengan kos (lihat ms 156A).]

Notes

For cases on absence of any party during trial, see 2(1) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1–5.

Cases referred to

Abdul Mutalib bin Dato' Seri Razak v The Malaysian Bar & Anor [1997] 3 MLJU 342 (refd)

Hup San Timber Trading Co Sdn Bhd v Tan Ah Lan [1979] 1 MLJ 238 (refd)

Syarikat Pasir Perdana v Goh Pak Hoong Tractor and Building Construction [1981] 1 MLJ 314 (refd)

Legislation referred to

Subordinate Courts Rules 1980 O 28 r 7

K Pathmanathan (*Mawar bte Awang* with him) (*Mawar Nathan & Co*) for the plaintiffs/appellants.

VP Nathan (*VP Nathan & Partners*) for the defendants/respondents.

Nik Hashim J: This is an appeal against the decision of the learned sessions court judge who on 2 August 2000, dismissed with costs the plaintiffs' claim for loss of dependency of their son who passed away as a result of motor vehicle accident on 29 March 1998 between the motorcycle ridden by the plaintiffs' deceased son and the motor car driven by the first defendant along the Jalan Paka-Dungun.

The plaintiffs' action was set for trial on 2 August 2000 and both the plaintiffs and the defendants were absent on that date. Only their counsel were present. The plaintiffs' counsel applied for an adjournment but it was rejected. It is to be noted that this was the second adjournment requested by the plaintiffs. The first adjournment was allowed on 4 August 1999. In dismissing the application for the second adjournment, the learned judge in his judgment at p 20 of the record said:

> On 2 August 2000, when the case came up for hearing, the plaintiffs' counsel Miss Neo was present but both the plaintiffs were absent. No explanation was forthcoming from the plaintiffs' counsel as to why the plaintiffs were absent. The learned counsel requested for another adjournment of the case, since her clients were not in court but I was not minded to give one. Since no adjournment was granted and the learned counsel had no witnesses to call, I dismissed the plaintiffs' claim with costs.

After perusing the written submissions of both parties and hearing the oral submission of the plaintiffs' learned counsel whilst the learned counsel for the defendants being absent, I, on 16 January 2002 allowed the appeal with costs to be borne by the plaintiffs and set aside the orders of the learned judge.

The issue is whether the judge was right to dismiss the plaintiffs' action in the circumstances of this case.

The provision governing the procedure and power of the court in cases where the plaintiff does not appear in court on the date of hearing is provided under O 28 r 7 of the Subordinate Courts Rules 1980 ('the SCR') which states:

> If, when an action is called on for hearing the *defendant appears* but the plaintiff does not appear the court *may*:
>
> (a) if the defendant has no counterclaim, *dismiss* the action with costs;
>
> (b) if the defendant has a counterclaim, give judgment for the defendant on his counterclaim; and
>
> make any other order as it thinks fit.
>
> (Emphasis added.)

By the provision, it is clear therefore that the court may only dismiss the plaintiffs' action if the defendant appears on the date of hearing. In the present case, both the plaintiffs and defendants did not appear on 2 August 2000, the date fixed for the hearing of the plaintiffs' action. Therefore, the learned judge was erroneous when he dismissed the plaintiffs' action as the facts did not disclose that the defendant was present on the date of the trial. At that juncture, the law does not give the court the right to dismiss the plaintiffs' action. The dismissal of the plaintiffs' action was thus premature,

and indeed not in accordance with O 28 r 7(a) of the SCR. What the learned judge ought to have done at most was to strike out the plaintiffs' action and thereafter it is for the plaintiffs to apply to reinstate the matter giving reasons for the non-attendance. If the trial court finds that the reasons given are not satisfactory and sufficient then only he shall dismiss the plaintiffs' application with costs.

It is true that the court cannot allow all adjournments sought (*Syarikat Pasir Perdana v Goh Pak Hoong Tractor and Building Construction* [1981] 1 MLJ 314). But in the event of doubt as to the real reason behind the inability of the other party to attend court, the court should have allowed an adjournment to enable both parties to be heard. Any delay occassioned by what appeared to be an inadequate reason for absence could be compensated by an award of appropriate costs (*Hup San Timber Trading Co Sdn Bhd v Tan Ah Lan* [1979] 1 MLJ 238). In exercising the discretion to grant an adjournment, the court has to consider the merits of the application (*Abdul Mutalib bin Dato' Seri Razak v The Malaysian Bar & Anor* [1997] 3 MLJU 342).

In the instant case, the plaintiffs were not given a chance to explain the reasons for their absence. In my view, it is unjust to dismiss the plaintiffs' action simply because of the plaintiffs' absence. The plaintiffs' action however is not without merits. The sketch plan and key at pp 42 and 43 of the record show the defendants' motor car brake marks measuring 20m long were on the wrong side of the road. Thus, in order to do justice to both parties, the adjournment sought by the plaintiffs' counsel ought to be allowed with costs by the learned judge to enable both parties to be heard at a trial. In the circumstances, the learned judge's orders in refusing to grant the adjournment and dismissing the plaintiffs' action were therefore wrong in law and should be set aside.

In the event, I made the orders accordingly.

Order accordingly.

Reported by Ezatul Zuria Azhari